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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

NO. 73-927

BENJAMIN F. WHITE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Benjamin F. White, prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Seventh Circuit entered on November 14, 1973, affirming his conviction under Title 21, United States Code, Section 846.

OPINION BELOW

Judgment was entered by the United States District Court for the Southern District of Indiana, without opinion, on May 17, 1973. The opinion of the United States Court of Appeals for the Seventh Circuit, unreported as of this date, is set forth in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1973. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the right to trial by jury includes the right to have the jury determine the weight and credibility of the evidence and to resolve conflicts therein.

2. Whether petitioner's rights to due process and trial by jury were denied by the trial court's refusal to permit the jury to consider all of the evidence admitted and to determine questions of weight and credibility.

3. Whether petitioner's rights to due

process and trial by jury were denied by the trial court's refusal to permit the jury to listen to tape recordings of telephone conversations, after such tape recordings had been admitted into evidence, and where other evidence concerning these telephone conversations was in conflict.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article III, Section 2:

> "The judicial power shall extend to all cases ... arising under this Constitution, the laws of the United States ....
>
> * * *
>
> "The trial of all crimes, except in cases of impeachment, shall be by Jury ....."

Constitution of the United States, Amendment V:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ...."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and ... to be confronted with the witnesses against him ...."

STATEMENT OF THE CASE

The petitioner was charged in one count of a four count indictment, with conspiring with others to distribute narcotic drugs in violation of Title 21, United States Code, Section 846 (Appendix B). Two co-defendants, named in the conspiracy count, were also charged with substantive offenses. All three defendants were jointly tried by jury in the United States District Court for the Southern District of Indiana and each was found guilty.

The indictment did not charge, nor did the evidence at the trial show, any substantive offense committed by petitioner. The entire basis of the Government's case against petitioner were conversations petitioner was alleged to have had with one Donald Collins, a Government informer. Three telephone conversations, occurring on March 21, 28 and 29, 1972, were recorded on cassette tapes by Special Agent Joseph M. Jovonovich, of the Bureau

of Narcotics and Dangerous Drugs. (Tr. 7, 11, 29, 30, 44, 45.*) Subsequently, Agent Jovonovich transcribed these tapes by playing them and writing down what was said. (Tr. 76, 77.) Agent Jovonovich first heard petitioner's voice three months later on June 30, 1972. (Tr. 88). Collins was also given a hidden transmitter and sent to engage in direct conversations with petitioner. These transmissions were taped on the same recorder but were incoherent. (Tr. 47, 393.) Jovonovich could not recognize any voices except Collins. (Tr. 51.)

The cassette tapes of the telephone conversations (Govt. Exs. 4A, 5A and 6A; Tr. 77) and typewritten transcriptions of these tapes (Govt. Exs. 4B, 5B and 6B; Tr. 78, 79, 80), were each identified and admitted into evidence. (Tr. 83, 84.)

On numerous occasions during the trial, counsel for petitioner objected to Collins' testimony concerning the conversations and requested that the tapes be played. (Tr. 194, 195, 196, 201, 202, 216, 217.) Collins' testimony concerning the conversations conflicted with that shown on the transcripts (Tr.200, 254, 256, 257.) On the witness stand the petitioner denied having discussed drugs with Collins, although he could have talked to Collins on the telephone on those

*There was no appendix. References are to pages of the Reporters' Official Transcript of Proceedings at Trial.

dates. (Tr. 423, 429.)

The attorney for the Government read aloud to the jury the transcripts of the telephone conversations. (Govt. Exs. 4B, 5B and 6B; Tr. 206, 214.) They were later handed to the jurors for their own reading. (Govt. Exs. 4B, 5B and 6B; Tr. 386.) Although the cassette tapes (Govt. Exs. 4A, 5A and 6A) were admitted into evidence (Tr. 84), they were not played for the jury and while the jury was told that all exhibits introduced into evidence would go to the jury room with the jury (Tr. 381, 382), the Trial Court ruled that the jury would not be given a tape recorder (Tr. 388).

The Court of Appeals stated that, "Quite frankly, we do not know why the district judge decided not to let the jury play the tapes in the jury room when asked by counsel if they would be able to do so," (Appendix A, p. 3a) but held that since the tapes were admitted into evidence there was no error. Petitioner's conviction was affirmed. (Appendix A, p. 7a.)

REASONS FOR GRANTING THE WRIT

Petitioner's right to due process of law and to trial by jury were denied by the District Court and such denial was sanctioned by the Court of Appeals. In failing to find reversible error, the decision of the Court of Appeals is in

conflict with applicable decisions of this Court.

The jury is the sole judge of the weight of the evidence and the credibility of the witnesses. It alone must resolve conflicts in the evidence. To withhold from the jury duly admitted evidence which goes to weight and credibility and which could resolve conflicting evidence, is to deny the petitioner his right to trial by jury and his right to due process of law.

Donald Collins was the only witness linking petitioner with any crime. His credibility and the weight given to his testimony were crucial. His testimony with regard to the telephone conversations materially conflicted with the transcripts Agent Jovonovich wrote out the transcripts but Government Exhibits 4B, 5B and 6B were typewritten. The petitioner testified in his own defense and denied that he had dis cussed narcotics with Collins. Collins' testimony was in conflict. The jury, by listening to the tapes, could have resolve these conflicts and determined the weight and credibility of Collins' testimony. The jury could also have compared petition er's voice from the stand with the voice on those tapes. Petitioner was denied the right to trial by jury as to these issues.

The Court of Appeals held that decisions concerning the erroneous ex- clusion of evidence were inapposite

because the tapes were admitted into evidence. The admission of relevant evidence is indeed hollow when that evidence is not permitted to go to the jury. The denial of the right to have the jury listen to the tapes is the exclusion of that evidence regardless of whether it is admitted. Such is analogous to a court's admission of a document in evidence but sealing it in an envelope so that it cannot be seen by the jury and then permitting testimony concerning that document.

The Court of appeals rejected petitioner's argument that the evidence was insufficient because of grave doubts as to Collins' credibility, by stating that credibility was a matter for the jury and that their verdict indicated that they believed Collins. Thus, while the Court of Appeals upheld the conviction based upon the jury's finding of Collins' credibility, it sanctioned the withholding from the jury evidence which went to that credibility.

The right to trial by jury is fundamental and is also part of the right to due process of law. *Duncan v. Louisiana*, 391 U.S.145 (1968); *In re Murchison*, 349 U.S. 133 (1955). The verdict of the jury must be based upon the evidence at the trial. *Turner v. Louisiana*, 379 U.S. 466 (1965). A verdict based upon less than all of the evidence is as violative of due process as a verdict based upon matters not in evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PHILIP R. MELANGTON, JR.
120 East Market Street
Suite 933
Indianapolis, Indiana

Counsel for Petitioner,
Benjamin F. White

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Argued October 30, 1973

November 14, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOHN PAUL STEVENS, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. 73-1644 vs.	No. IP 72-CR-173
BENJAMIN F. WHITE, Defendant-Appellant.	JAMES E. NOLAND, Judge

O R D E R

Appellant and two others were convicted by a jury on a charge of willfully and knowingly conspiring to distribute heroin HCL in violation of 21 U.S.C § 846. On this appeal, he claims that the trial court committed prejudicial error in refusing to allow the jury to listen to the tape of a tejephone conversation between himself and a government informer in which a sale of

narcotics was allegedly arranged; and that there is insufficient evidence to support the jury's verdict. We affirm.

The charge concerned sales of heroin made to the government informer, Donald Collins, on March 21, March 28, and March 29, 1972. The circumstances surrounding each of the sales transactions are substantially similar. On each date, the informer Collins telephoned Mr. Benjamin's Tailoring Shop, of which appellant was the proprietor, and spoke to appellant. All three calls were placed from the Indianapolis office of the Bureau of Narcotics and Dangerous Drugs, and BNDD Agent Jovonovich monitored and recorded each. Shortly after the first telephone call, Collins proceeded to Mr. Benjamin's Tailoring Shop where he made a purchase of heroin from appellant's co-defendant, William DeForest Thomas. Collins testified that Thomas told him that he would have to do business with him because appellant was "tied up."[1/] Another Narcotics Agent, Melvin Schabilion, testified that Thomas was readmitted to the Tailoring Ship by a "person strongly resembling defendant White."[2/] On the second and third occasions, following the telephone conversations, Collins went to appellant's place of business and was dir-

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1/ Tr. 196.

2/ Tr. 358.

ected to the apartment of co-defendant Sherri Harris, where the sales were consummated.

THE TAPES

The first error that the appellant urges upon us is the refusal of the district court to permit the jury to hear the recordings of the telephone conversations, either in the courtroom or after they had retired to consider their verdict, even though the tapes had been duly admitted into evidence. Quite frankly, we do not know why the district judge decided not to let the jury play the tapes in the juryroom when asked by counsel if they would be able to do so.[3/]

Rule 1002, Proposed Fed. R. Evid., which provides that "to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required....," does not help the appellant, for there is no question that the transcript of the telephone conversation is accurate. When the Government offered the tapes into evidence, Mr. Sobel, appellant's trial counsel, examined Agent Jovonovich, who had taped and then transcribed the conversations:

3/ Interestingly, it was counsel for defendant Thomas, and not trial counsel for appellant, who asked whether the jury would be able to hear the tapes upon retirement. Tr. 388. For all that appears, the judge may have been trying to protect appellant from undue prejudice.

Q. You played them [the tapes] over several times while transcribing?

A. That is correct.

Q. Did you understand every word that you heard on these tapes?

A. As far as I was concerned, sir, I did.

Q. As far as you were concerned, sir, you did?

A. Yes.

Q. You did not find it necessary to interpolate any words at all?

A. Do you mean that if I came across a word that I did not understand, that I used my own words?

Q. Yes.

A. No. I did not. This is the exact transcript.

Q. Were there any words that you filled in with, because you could not understand what the word was?

A. No.

Q. This is exactly what you heard on that tape?

A. Yes. These words are the exact words on the tape.

Tr. 82-83.

The tapes were then admitted into evidence without objection. The cases appellant cites are therefore inapposite. McCandless v. United States, 298 U.S. 342, Evans v. United States, 277 F.2d 351 (D.C. Cir. 1960), Wynn v. United States, 397 F.2d 621 (D.C. Cir. 1967), and United States v. Minor, 459 F.2d 103 (5th Cir. 1972), discuss the erroneous exclusion of evidence; and Bihn v. United States, 328 U.S. 633, involves an erroneous charge to the jury.

We can find no basis, on these facts, for saying that the trial judge abused his discretion in allowing the jury only to read the transcripts of telephone conversations which were indisputably correct, and not to hear the tapes themselves.

SUFFICIENCY OF THE EVIDENCE

The test for determining whether evidence is sufficient to sustain conviction by a jury of conspiracy to sell narcotics was recently set forth by Chief Judge Swygert as follows:

> "...[W]e must determine whether all the evidence when viewed in the light most favorable to the Government and considering the jury's right to weigh evidence, determine credibility, and draw justifiable inferences, could fairly support a verdict of guilt beyond a reasonable doubt." United States v. Cardi, 478 F.2d 1362, 1268 (1973), cert. denied 42 U.S.L.W. 3270.

In the present case, the Government informer, Collins, testified to having

telephone conversations with the appellant which, he claims, led to the sales of heroin.[4] We would expect that conversations over the telephone concerning such transactions might well be conducted in ambiguous terms, and the informer's testimony could have been understood by the jury as construing the ambiguities.[5] He further testifed that, in accord with appellant's statements over the telephone, he went to his place of business. Once the purchase of heroin was made directly from defendant Thomas; twice Collins was sent to a different address, where the purchase was made from defendant Harris. The appellant argues that Donald Collins was a Government informant and a convicted felon, whose credibility should have been gravely in doubt. Credibility, however, is a matter for the jury, and their verdict indicates that the jurors believed him. As in Cardi, the "evidence ...satisfied the requirement that the Government prove an individual defendant's participation in an unlawful conspiracy by his own words and actions and not those of other participants." 478 F.2d at 1368.

4/ The fact that sales of heroin occurred is not disputed by appellant.

5/ The words "heroin" and "narcotics" do not appear in the telephone conversations. However, the word "pieces" which, the record discloses, amounts to a code word for a certain quantity of heroin, does appear in Government's Exhibit 6-B, the transcript of the recording of the conversation of March 29.

The conviction is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)
	)
v.	)
	)NO. IP 72-CR-152
BENJAMIN FRANKLIN WHITE	)
WILLIAM GREEN	)
SHERRI HARRIS	)

I N D I C T M E N T

Count I

The Grand Jury charges that:

On or about the 21st day of March, 1972, in the Southern District of Indiana, WILLIAM GREEN knowingly and intentionally did unlawfully distribute about 4.906 grams of heroin HCL, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1).

Count II

The Grand Jury further charges that:

On or about the 28th day of March, 1972, in the Southern District of Indiana, SHERRI HARRIS knowingly and intentionally did unlawfully distribute about 9.944 grams of heroin HCL, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a) (1).

Count III

The Grand Jury further charges that:

On or about the 29th day of March, 1972, in the Southern District of Indiana, SHERRI HARRIS knowingly and intentionally did unlawfully distribute about 1.604 grams of heroin HCL, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a) (1).

Count IV

The Grand Jury further charges that:

On or about the 21st day of March, 1972, in the Southern District of Indiana, and elsewhere, BENJAMIN FRANKLIN WHITE, WILLIAM GREEN and SHERRI HARRIS, the defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together, with each other, and with divers other persons whose names are to the Grand Jury unknown, to unlawfully distribute heroin HCL, a Schedule I narcotic controlled substance, in violation of Section 845, Title 21, United States Code.

Overt Acts

1. On or about the 211st day of March, 1972, WILLIAM GREEN exited the front door of Benjamin's Tailoring Shop at 2931 North Central Avenue, Indianapolis, Indiana,

2. On or about the 28th day of March, 1972, BENJAMIN FRANKLIN WHITE telephonically discussed heroin with another individual.

3. On or about the 28th day of March, 1972, BENJAMIN FRANKLIN WHITE discussed

heroin with another individual in the Benjamin's Tailoring Shop at 2931 North Central Avenue, Indianapolis, Indiana.

4. On or about the 28th day of March, 1972, SHERRI HARRIS was present at Apartment 2A, 2161 North Meridian, Indianapolis, Indiana.

5. On or about the 28th day of March, 1972, SHERRI HARRIS opened the door of Apartment 2A, at 2161 North Meridian, Indianapolis, Indiana, and admitted an individual.

A True Bill:

s/ James R. Wark
Foreman

s/ Stanley B. Miller
United States Attorney

CERTIFICATE OF SERVICE

This is to certify that I have served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit upon:

The Honorable Stanley B. Miller
United States Attorney
246 Federal Building
Indianapolis, Indiana 46204

and

The Solicitor General of the
United States
United States Department of Justice
Washington, D. C. 20520

by personal delivery, this 14th day of December, 1973.

Philip R. Melangton, Jr.

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No. 73-927

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In the Supreme Court of the United States

OCTOBER TERM, 1973

BENJAMIN F. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-927

BENJAMIN F. WHITE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in refusing to permit the jury, after it retired to deliberate, to hear recordings of telephone conversations which had been admitted into evidence, but not played before the jury.

Petitioner was charged in Count IV of a four count indictment, together with co-defendants William Thomas and Sherri Harris, with conspiring to distribute heroin, in violation of 21 U.S.C. 846. Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted and sentenced to fifteen years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner was involved in sales of heroin to government informer on March 21, 28 and 29, 1972. On each date, prior to the

sale, the informer placed a telephone call from the Indianapolis Office of the Bureau of Narcotics and Dangerous Drugs to Mr. Benjamin's Tailoring Shop and spoke to petitioner, who was the proprietor of the shop. These calls were to make arrangements for the subsequent sales. Each call was monitored and recorded by a BNDD agent with the informer's consent (Pet. App. 2a; Tr. 5-7, 29-30, 43-45). Following the first telephone call, the informer went to petitioner's shop, where he purchased a quantity of heroin from co-defendant Thomas (Pet. App. 2a). Following the second and third telephone calls, the informer went to petitioner's shop and was directed by petitioner to the apartment of co-defendant Harris, where the sale was consummated (Pet. App. 2a-3a).

At trial, the tape recordings of the conversations between petitioner and the government informer were admitted into evidence, together with transcripts of the conversations, which had been transcribed by the agent who had overheard the conversations (Tr. 79-84).[1] When the government offered the transcripts into evidence, petitioner's counsel examined the agent who transcribed the tapes to determine their accuracy; the transcripts were then admitted without objection (Pet. App. 4a-5a; Tr. 81-83). Shortly thereafter, the

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[1]Although petitioner does not challenge the sufficiency of the evidence to sustain his conviction, we point out that in addition to the transcripts of the tape recorded conversations, the substance of those conversations was testified to by the informer. The government informer testified about the conversations with petitioner on March 28 and 29 in which the purchase of heroin was discussed. He also testified that petitioner directed him to the place where he could make the purchases. (Tr. 216-223, 235-236). This was corroborated by agents who overheard parts of the conversations through the use of a Kel transmitting device hidden on the informer's person (Tr. 84-100).

tape recordings themselves were admitted without objection (Tr. 83-84). The entire text of the transcripts was read to the jury (Tr. 206-214) and given to the jurors to read for themselves (Tr. 382). The tape recordings were not played before the jury. The court stated that during the deliberations the jury would not be given a tape recorder with which to listen to the tapes, but would be given the transcripts of the recordings (Pet. App. 5a; Tr. 382, 388)[2]. Petitioner testified on his own behalf and admitted having telephone conversations with the informer, but denied that they concerned narcotics (Tr. 422-423).

Petitioner argues that he was prejudiced by the fact that the tapes were not played to the jury and were not available to the jury during their deliberations. He alleges that several objections were made concerning the testimony of the government informer and requests made that the tapes be played (Pet. 5). The record reveals, however, that petitioner's objections were directed to preventing the informer from testifying to conversations with petitioner because transcripts and recordings of those conversations had already been admitted into evidence and should be presented to the jury. The transcripts of the recordings were then read to the jury as a result of petitioner's objections (Tr. 206-214). No objection was made when the government offered to read the transcripts rather than play the tapes (Tr. 206). The accuracy of the transcripts was never challenged and was in fact stipulated to by all parties (Tr. 81, 83). Petitioner has failed to show that he was in any

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[2]The court did not give a reason for not allowing a recorder in the jury room, and petitioner did not object to the ruling (Pet. App. 3a; Tr. 388).

way prejudiced by the fact that the tapes themselves were not made available to the jury.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[3]Petitioner's claim that if the tapes had been played the jury could have compared petitioner's voice with the recorded voice goes merely to the sufficiency of the voice identification. The evidence on that issue was ample. Moreover, petitioner did not ask to play the recording for that purpose, and there is no indication in the record that he would have been prevented from doing so.